



[Billing Code: 7510-01]

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

14 CFR Part 1260

RIN 2700-AD79

Profit and Fee under Federal Financial Assistance Awards

AGENCY: National Aeronautics and Space Administration.

ACTION: Proposed rule.

SUMMARY: NASA is revising the NASA Grant & Cooperative Agreement Handbook to clarify that NASA does not pay profit or fee on Federal Financial Assistance awards, *i.e.* grants and cooperative agreements, to non-profit organizations. This proposed rule would make changes to NASA regulations to reflect that revision.

DATES: Interested parties should submit comments to NASA at the address identified below on or before **[INSERT DATE 60 DAYS AFTER PUBLICATION IN FEDERAL REGISTER]** to be considered in formulation of the final rule.

ADDRESSES: Interested parties may submit comments, identified by RIN 2700-AD79, via the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments. Comments may also be submitted to William Roets (Room 5K34), NASA Headquarters, Office of Procurement, Contract Management Division, Washington, DC 20546. Comments may also be submitted by email to: william.roets-1@nasa.gov.

FOR FURTHER INFORMATION CONTACT: William Roets, NASA Office of Procurement, Contract Management Division, Suite 5K34, 202-358-4483, william.roets-1@nasa.gov.

SUPPLEMENTARY INFORMATION:

I. Background:

NASA published a proposed rule for Profit and Fee Under Financial Assistance Awards in the Federal Register on January 11, 2012 (77 FR 1657). The public comment period closed on March 11, 2012. By the end of the established comment period, NASA received comments from one entity. However, those comments were subsequently determined to have been submitted to the incorrect docket and were not applicable to the proposed rule. After the specified end date for the submission of comments had passed, three organizations submitted late comments to the proposed rule. NASA accepted the late comments. Based on the comments received and subsequent revisions to the proposed rule, NASA is publishing this rule again as a proposed rule. Historically, NASA has discouraged the payment of profit or fee under its Federal Financial Assistance awards because payment in excess of costs is inconsistent with the intent of grant and cooperative agreements which provide funding in the form of financial assistance to recipients for their performance of a public purpose. For commercial firms, payment of profit or fee is specifically prohibited in NASA policy. Because this prohibition does not include recipients such as non-profit organizations, NASA's policy has been misinterpreted and inconsistent application has occurred. This rule, which will extend this prohibition on the payment of profit or fee² to all recipients of NASA grants and cooperative agreements, will alleviate the misinterpretation and inconsistent application of this policy.

II. Discussion and Analysis

Comment 1: It is long-standing NASA Policy to allow a management fee. NASA has a rich history of closely partnering with nonprofit organizations to advance space science and research.

To help meet its important mission, NASA has long recognized the importance of allowing a modest management fee under cooperative agreements. This proposed change would represent a major shift in NASA policy supporting their nonprofit partners in the space science and technology research area.

Response: NASA continues to support non-profit partners and does not consider this change a major shift in policy, but rather a clarification of NASA's policy regarding profit and fee under grants and cooperative agreements and is consistent with proposed OMB Uniform Guidance: Cost Principles, Audit, and Administrative Requirements for Federal Awards, 78 FR 7282, February 1, 2013.

There appears to have been some confusion with regard to the term 'management fee'.

Management fees that are allowable, allocable, reasonable and necessary costs in accordance with an entity's established accounting practices and Government cost principles will be paid by NASA. This rule is clarifying that NASA will not pay profit or fee where profit or fee is defined as the amounts above allowable costs. The language in this rule has been revised to clarify this point.

Comment 2: NASA has the statutory authority to allow a management fee.

Response: While the Space Act of 1958 (42 U.S.C 2473(c)(5)) provides NASA broad authority and discretion to award grants and cooperative agreements to fulfill its mission, the Agency has no express or explicit authority with regard to 'management fees'.

Comment 3: NASA proposed the same change in 1998, (63 FR 71609) Dec 29, 1998, and withdrew it after full consideration.

The proposed rule was withdrawn on May 18, 1999. NASA “decided to withdraw the proposed rule because, in limited situations, a nominal fee may be warranted and necessary for the recipient to perform NASA research” (64 FR26923) May 18, 1999.

NASA now seeks to reverse this longstanding policy, and is using the same rationale in the recently proposed rule change that it had used in 1998, but later withdrew in 1999.

Response: NASA has long recognized that the grant and cooperative agreement regulation is incomplete in its coverage of profit and fee in that it fails to address non-profit organizations. NASA’s attempts to address application of the regulation through internal agency guidance have not fully resolved the problem. Notwithstanding the improvements brought about through changes to internal processes, NASA has determined that it is necessary to clarify the regulation with regard to the payment of profit or fee on grants or cooperative agreements in order to prevent payment for unallowable costs. The language in this rule has been revised to clarify this point.

Comment 4: Prohibiting management fee on cooperative agreements would jeopardize the ability of non-profit organizations to continue operations.

Response: NASA has revised the regulatory language to clarify that the Agency will pay all recipients’ allowable, allocable, reasonable and necessary costs. Profit or fee in excess of cost will not be paid.

Comment 5: Allowing Management Fee is consistent with a recent NASA OIG Report.

(April 30, 2012, NASA OIG Report, NASA’s Use of Research Announcement Awards for Aeronautical Research, Report No. IG-12-011 (Assignment No. A-11-013-00)).

Response: The referenced report contained a finding that some NASA research awards contained “unallowable fee.” Specifically, the Report found that NASA paid fee to a University under a contract, not a grant or cooperative agreement, and the finding is not relevant to this rule.

Comment 6: Dating back to the Bell Report of 1962, issued by the Bureau of the Budget and signed by President Kennedy, the Government has recognized the need to provide fees to nonprofit organizations. Whereas fees paid to for-profit entities provide contributions to profits, modest fees paid to nonprofit organizations are provided for operating capital and ordinary business expenses that are non-reimbursable.

Response: Pursuant to OMB Circular A-122, Cost Principles for Non-Profit Organizations, unallowable costs are not reimbursable. Further, in accordance with the proposed OMB Uniform Guidance: Cost Principles, Audit, and Administrative Requirements for Federal Awards, 78 FR 7282, Feb. 1, 2013, Federal agencies are only authorized to pay for allowable, allocable, reasonable, and necessary costs.

Comment 7: Nonprofit organizations do not generate a profit, and rely on funding to continue operations. There are many costs to nonprofits that are not allowable under government fiscal regulations, but which must be paid for the nonprofit to continue operating. Many nonprofits would find it impossible to continue operations, or would be forced to drastically reduce their research capability, without a management fee being awarded.

Response: Pursuant to OMB Circular A-122, Cost Principles for Non-Profit Organizations, unallowable costs are not reimbursable. Federal agencies are only authorized to pay for allowable, allocable, reasonable, and necessary costs.

Comment 7: NASA received comments related to cross waivers of liability in this docket, but they clearly do not relate to this rule, and are therefore, not addressed here.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

NASA certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule does not impose any additional requirements on small entities and currently less than 1 percent of recipients of NASA grants and cooperative agreements receive profit or management fees.

V. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104-13) is not applicable because the prohibition on payment of profit and management fees by NASA does not require the submission of any

information by recipients that requires the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 14 CFR Part 1260

Colleges and universities, Business and Industry, Grant programs, Grants administration, Cooperative agreements, State and local governments, Non-profit organizations, Commercial firms, Recipients

William P. McNally,
Assistant Administrator for Procurement.

Accordingly, 14 CFR part 1260 is proposed to be amended as follows:

PART 1260-GRANTS AND COOPERATIVE AGREEMENTS

1. The authority citation for 14 CFR part 1260 continues to read as follows:

Authority: 42 U.S.C. 2473(c)(1), Pub. L. 97-258, 96 Stat. 1003 (31 U.S.C. 6301, *et seq.*), and OMB Circular A-110.

2. In § 1260.4, paragraph (b)(2) is revised to read as follows:

§ 1260.4 Applicability.

* * * * *

(b)* * *

(2) Payment of fee or profit is consistent with an activity whose principal purpose is the acquisition of goods and services for the direct benefit or use of the United States Government, rather than an activity whose principal purpose is assistance. Therefore, the grants officer shall use a procurement contract, rather an assistance instrument, in all cases where fee or profit is to

be paid to the recipient of the instrument or the instrument is to be used to carry out a program where fee or profit is necessary to achieving program objectives. Grants and cooperative agreements shall not provide for the payment of fee or profit to the recipient.

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3. In § 1260.10, paragraph (b)(1)(iv) is added to read as follows:

§ 1260.10 Proposals.

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(b)* * *

(1)* * *

(iv) Payment of fee or profit is consistent with an activity whose principal purpose is the acquisition of goods and services for the direct benefit or use of the United States Government, rather than an activity whose principal purpose is assistance. Therefore, the grants officer shall use a procurement contract, rather an assistance instrument, in all cases where fee or profit is to be paid to the recipient of the instrument or the instrument is to be used to carry out a program where fee or profit is necessary to achieving program objectives. Grants and cooperative agreements shall not provide for the payment of fee or profit to the recipient.

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4. In § 1260.14, paragraph (e) is added to read as follows:

§ 1260.14 Limitations.

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(e) Payment of fee or profit is consistent with an activity whose principal purpose is the acquisition of goods and services for the direct benefit or use of the United States Government, rather than an activity whose principal purpose is assistance. Therefore, the grants officer shall use a procurement contract, rather an assistance instrument, in all cases where fee or profit is to

be paid to the recipient of the instrument or the instrument is to be used to carry out a program where fee or profit is necessary to achieving program objectives. Grants and cooperative agreements shall not provide for the payment of fee or profit to the recipient.

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